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November 18, 2004

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: WC Docket No. 04-313, CC Docket No. 01-338

Dear Ms. Dortch:

Some RBOCs have urged the Commission to extend EEL eligibility criteria established in the *Triennial Review Order* to stand-alone DS-1 or other UNE loops.¹ Alpheus Communications, LP ("Alpheus"), ATX Communications, Inc., Covad Communications, CTC Communications Corp., Focal Communications Corporation, Freedom Ring Communications, LLC, d/b/a Bay Ring, GlobalCom, Inc., Mpower Communications Corp., Ntelos, Inc., OneEighty Communications, Inc., RCN Telecom Services, Inc., and TDS Metrocom, LLC, opposes these proposals as unlawful, misguided and unnecessary.

I. EXTENDING EEL ELIGIBILITY CRITERIA TO STAND-ALONE UNE LOOPS WOULD BE UNLAWFUL

Although the EEL eligibility requirements have previously survived court review, the Commission does not have unlimited ability to apply or extend them. Under the terms of the Act, as interpreted by *USTA II*, the Commission may exclude providers of certain telecommunications services from UNE eligibility only if it finds that such carriers would not be impaired without the UNEs.² Accordingly, the Commission may continue to apply eligibility rules to deny UNE EELs to carriers providing only interexchange services if the Commission believes such carriers are not impaired. Applying these EEL eligibility criteria to stand-alone loops, however, would unlawfully inappropriately preclude legitimate uses of UNE loops by

¹ See *TRO*, ¶¶ 590-611; 47 C.F.R. § 51.318. Verizon Comments at 78-79, SBC Comments 97-98.

² *USTA v. FCC*, 359 F.3d 554, 591-592 (D.C. Cir 2004) ("*USTA II*").

carriers that without access to these UNEs would be impaired in their ability to provide local exchange access, high capacity circuits, xDSL services, or data services.

The record clearly demonstrates that carriers seeking to provide local exchange access or data services remain impaired without access to stand-alone loops. Because the facilities used for providing exchange access and non-voice services are the same physical facilities that CLECs use to provide voice service, there is no justification for allowing use for one service but not the other. The physical and economic barriers to duplicating those facilities are the same for all carriers regardless of the service provided using the loop facility. In other words, the impairment analyses for each of these services are so closely intertwined that a finding of impairment for one service precludes the opposite result for other services.

It is unclear what problem the Commission could address in considering a potentially unlawful extension of eligibility rules to stand-alone loops. There is no record evidence of any “misuse” of stand-alone loops or even any risk that such misuse could occur that would warrant imposing eligibility criteria. In the *TRO*, the Commission found that the record did not indicate concern over misuse of stand-alone loops to provide non-qualifying services.³ The Commission noted the lack of controversy with respect to UNEs other than EELs and the greater administrative burdens of applying EEL criteria to stand-alone UNEs.⁴ Nothing has changed since these findings to warrant the radical and extremely harmful step of applying EEL criteria to stand-alone UNE loops. The *NPRM* in this proceeding did not even raise this issue.⁵ In fact, the record in this proceeding is devoid of any significant discussion of the need for application of EEL criteria to stand-alone UNE loops. While some BOCs have briefly requested this step, they utterly failed to provide any rational explanation that the Commission could lawfully adopt without needlessly increasing its legal exposure.⁶ As the Commission observed in the *TRO*, adopting use restrictions on stand-alone UNE loops, which would affect all facilities-based carriers that offer local services competing directly with services that the ILECs have traditionally dominated, simply “to avoid speculative concerns about access charge bypass by a few carriers would be a vastly over-inclusive solution in search of a very narrow, speculative problem.”⁷ In light of the total lack of record support for this radical and harmful step, we submit that it would be arbitrary and capricious for the Commission to apply EEL criteria to stand-alone loops.

³ *TRO*, ¶ 592.

⁴ *Id.*

⁵ See *Florida Power & Light Co. v. U.S.*, 846 F.2d 765, 771 (D.C. Cir. 1988) (the Commission must provide notice of a proposed rulemaking “adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process”); *MCI Telecommunications v. FCC*, 57 F.3d 1136 (D.C. Cir. 1995) (vacating and remanding FCC rules due to inadequate notice under *Florida Power* standard); *Sprint v. FCC*, 315 F.3d 369 (D.C. Cir. Jan 21, 2003) (remanding the FCC’s payphone compensation rules for lack of a sufficient logical relation between the Commission’s original notice and the ultimate rules it adopted).

⁶ See note 1, above.

⁷ *TRO*, n. 1824 (citing Covad Jan. 21, 2003 *Ex Parte* Letter at 3). To the extent the Commission remains concerned about the hypothetical prospects of IXC access charge bypass in the stand-alone loop context, the Commission can always exercise its enforcement authority to address speculative problems when and if they actually arise.

Nor is there any record evidence suggesting that IXC's could or would use UNE loops (as opposed to EELs) to avoid ILEC special access. CLEC's that use stand-alone UNE loops typically access those UNE loops in the end offices serving the customer loop locations. By contrast, IXC's access loops (or the special access equivalent, *i.e.* channel terminations) using EELs or special access circuits and interoffice mileage between the customer's serving wire center and other ILEC wire centers. In other words, there is no danger of a flash cut from special access to stand alone UNE loops because the IXC's lack the collocation presence to obtain access to stand alone loops. This is evident from the fact that the availability of stand-alone UNE loops for the past eight years has not led to conversions of access circuits to stand-alone loops.

Under rules in effect since 1996, IXC's have always been able to convert special access channel terminations to end-user customer premises to stand-alone UNE loops, yet there is nothing in the record suggesting that they have done so. While the Commission has relieved the commingling restriction that allows CLEC's to combine UNE loops with tariffed interoffice access service, such commingled combinations are subject to the same eligibility criteria as UNE EELs. Thus it is apparent that the RBOC proposal under consideration is targeted at CLEC's and seeks to discourage those CLEC's from connecting their own transport networks with UNE loops. Of course this would undermine the Commission's goal of promoting competitive investment in and provision of dedicated transport over CLEC owned networks.

II. IMPOSING EEL ELIGIBILITY CRITERIA ON STAND ALONE UNE LOOPS WOULD UNDERCUT IMPORTANT POLICY OBJECTIVES

A. UNE Loop Use Restrictions Would Inhibit Facilities-Based Competition

Applying EEL criteria to stand-alone UNE loops would also harm facilities-based competition. As noted, the Commission established the criteria to encourage facilities-based competition and prevent carriers that do not offer local services from using UNEs to provide long distance service.⁸ The Commission explained in the *TRO* that “[b]y gaming our eligibility criteria, we mean the case of a provider of exclusively non-qualifying service obtaining UNE access in order to obtain favorable rates or to otherwise engage in regulatory arbitrage.”⁹ However, Alpheus and other CLEC's are not providing “exclusively non-qualifying services” but rather are *bona fide* providers of local service including local data service and exchange access. The *TRO* found that local data service and access services such as xDSL, exchange access and high capacity services were services for which CLEC's could use UNEs to provide because they competed with services that the ILEC's traditionally have dominated.¹⁰ The 1996 Act requires the Commission to open to competition all of the markets over which ILEC's have maintained an historic stranglehold. The over-inclusive and unnecessary application of EEL criteria to stand-alone loops would undermine all CLEC's' ability to offer competitive services, and preclude competition in innovative, advanced services that the Commission elsewhere seeks to encourage.

⁸ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587, 9597 ¶ 18 (2000); *see also Competitive Telecommunications Assoc. v. FCC*, 309 F.3d 8, 14 (D.C. Cir 2002).

⁹ *TRO*, ¶ 591.

¹⁰ *TRO*, ¶ 140.

For instance, the BOC proposals would have a devastating impact on CLECs that use stand-alone loops to provide data services. The Commission has made it clear in a number of recent orders that it seeks to develop policies that will encourage the deployment of facilities to provide innovative broadband services, not just legacy voice services. CLECs such as Alpheus are doing that now, investing considerable sums in optronics to light dark fiber loops, but their efforts would be frustrated if they are denied access to UNE loops. For example, the Commission on Friday released its order freeing VoIP services from a patchwork quilt of state economic regulation. Restricting access to UNE loops to carriers providing legacy voice services would reduce competitive supply of data-only broadband services relied on by VoIP providers to reach their customers. In other words, imposition of use restrictions tied to a legacy architecture for delivering voice would undoubtedly undermine the growth in the new innovative services that rely on a broadband transmission capability.

Application of EEL criteria to stand-alone UNE loops would have a devastating impact on CLECs. Alpheus, for example, as non-voice provider, estimates that the vast majority of its revenue would be impacted if the Commission applies EEL criteria to stand-alone UNE loops. In reliance on the Commission's existing UNE loop rules, Alpheus has collocated in 117 ILEC central offices in Texas and has made significant investments in optronic equipment including DWDM to provide wholesale services including private line data and exchange access. There is simply no legal or policy basis that requires or that permits the Commission to forfeit Alpheus' investment by applying restrictive eligibility requirements to UNE loops.

B. Use Restrictions on UNE Loops Would Undermine Development of Wholesale Telecommunications Markets For All Services

Alpheus uses UNEs to provide telecommunications services on a wholesale basis to other carriers, and does not offer "voice" services. For this reason, Alpheus does not have, or need, interconnection trunks with ILECs, which are used for the exchange of voice traffic. As with other carriers that only provide data services, a narrow set of use or service restrictions that requires interconnection trunks to obtain DS1 loops would preclude Alpheus from obtaining DS1 loops, which, in turn, would most likely lead to Alpheus and other similarly-situated carriers exiting the market entirely.¹¹ Accordingly, the Commission should emphatically decline to impose use restrictions or other "eligibility criteria" on the use of high capacity UNE loops.

For example, many of Alpheus' customers are CLECs that provide local voice service. Rather than develop systems and train personnel to navigate the process of ordering and provisioning UNE loops from SBC, these customers rely on Alpheus to carry out that function and combine that loop with Alpheus transport network to deliver a seamless point to point circuit. While these customers may or may not satisfy the EELs eligibility criteria, Alpheus would not. Alpheus concentrates on its core competency --delivering innovative local and other transmission services over a state of the art network. Eliminating Alpheus' ability to participate in the market forces each of its customers to vertically integrate and perform every function internally. This is inefficient, unreasonable and overregulatory, and there is no basis in the law for imposing such restrictions.

¹¹ Letter from P. Goyal, Covad Communications to M. Carey, FCC, CC Dkt. Nos. 01-338, 96-98, 98-147, (Jan. 21, 2003).

For these reasons, Alpheus urges the Commission not to apply the EEL eligibility criteria to standalone UNE loops.

Sincerely,

A handwritten signature in black ink, appearing to be 'A. Lipman', with a long horizontal flourish extending to the right.

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